UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ST. CATHERINE HEALTHCARE AND REHABILITATION CENTER, LLC Employer

and

Case 28-RC-6661

DISTRICT 1199NM NATIONAL UNION OF HOSPITAL AND HEALTHCARE EMPLOYEES, AFSCME, AFL-CIO

Petitioner

DECISION AND ORDER REMANDING

The National Labor Relations Board¹ has considered objections and a determinative challenge to an election held June 19, 2009, and the administrative law judge's decision recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 29 for and 29 against the Petitioner, with one challenged ballot.

¹ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Teamsters Local 523 v. NLRB*, ____F.3d____, 2009 WL 4912300 (10th Cir. Dec. 22, 2009); *Narricot Industries, L.P. v. NLRB*, 587 F.3d 654 (4th Cir. 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. granted 130 S.Ct. 488 (2009); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377).

The Board has reviewed the record in light of the exceptions and brief, and has adopted the judge's findings² and recommendations except as noted below.

For the reasons stated by the judge, we affirm his conclusion that the challenged ballot should be counted as a vote for the Petitioner and we adopt his recommendation that the Employer's objections 7 and 10, alleging misconduct by the Regional Director, be overruled.³

The judge also recommended overruling the Employer's objections 5 and 9, which allege that the Board agent who conducted the election engaged in misconduct, including the solicitation of the Petitioner's challenge to the agent's decision to void a determinative ballot. With respect to this incident, the judge briefly described two versions of what the Board agent said to the parties' representatives at the ballot count after he voided the ballot and they shook hands with one another. According to the Board agent, he stated that any party has the right to challenge his interpretation of the ballot. Then he looked at Henry Santana, the primary Union representative, and asked him, "Are you challenging my interpretation of this ballot, that the ballot is void?"

Employer witnesses Jaime Andujo and Carol Dionne Motal did not testify that the Board agent said anything to the entire group regarding the rights of the parties to

² The judge was sitting as a hearing officer in this representation proceeding. The Union has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings.

³ In the absence of exceptions, we adopt pro forma the judge's recommendations that the Petitioner's objections 1, 3, and 4; the Employer's objections 2, 3, 4, and 8; and the Employer's additional objection to the Regional Director's failure to issue an Order removing the case to the Board's Division of Judges, be overruled. The Petitioner's objection 2 and the Employer's objections 1 and 6 were withdrawn.

challenge. According to Andujo, the Board agent looked at Santana and said, "I'm assuming that you are going to challenge." Motal testified that the Board agent told Santana, "I'm sure that you are going to want to challenge this."

The judge did not expressly credit any testimonial version of events. Under the circumstances, we find it preferable to remand this case to him to make this credibility finding before addressing the merits of the Employer's exceptions to the overruling of objections 5 and 9. Accordingly,

ORDER

IT IS ORDERED that this proceeding is remanded to the judge for reconsideration of the disputed evidence and the issuance of a supplemental report including credibility determinations, findings of fact, and recommendations. Following the issuance of the judge's supplemental report, the provisions of Section 102.69(i)(2) of the Board's Rules and Regulations shall apply.

Dated, Washington, D.C., February 1, 2010.

| | Wilma B. Liebman, | Chairman | |
|-------|---------------------|--------------------------------|--|
| | Peter C. Schaumber, | Member | |
| SEAL) | NATIONAL LABOR | NATIONAL LABOR RELATIONS BOARD | |